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No. 260

In the Supreme Court of the United States

SEISMOGRAPH SERVICE CORPORATION,
Appellant,
vs.
NOEL MONAGHAN, CHAIRMAN, STATE TAX COMMISSION, *Appellee.*

JURISDICTIONAL STATEMENT.

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SEISMOGRAPH SERVICE CORPORATION,
Appellant,

vs.

NOEL MONAGHAN, CHAIRMAN, STATE TAX COMMISSION, *Appellee.*

JURISDICTIONAL STATEMENT.

Pursuant to the provisions of Rule 13 of the Supreme Court of the United States, the appellant, Seismograph Service Corporation, files this its separate statement particularly disclosing the basis on which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the judgment appealed from herein.

(a) Reference to Reports of Opinions in Courts Below.

The opinion of the Supreme Court of the State of Mississippi handed down in this case is reported at 108 So. 2d 721. The opinion of the Trial Court is unreported. A copy of the opinion of each of said courts is appended to this statement.

(b) Grounds Upon Which Jurisdiction Is Invoked.

The grounds upon which the jurisdiction of this court is invoked are those which appear below.

i) This suit was brought to recover sales taxes unlawfully assessed and collected from the appellant, Seismograph Service Corporation, by the appellee, State Tax Commission of the State of Mississippi. The suit was brought against the Chairman, State Tax Commission, in the Chancery Court of Hinds County, Mississippi, pursuant to Section 10124, Mississippi Code of 1942, Recompiled.

ii) The judgment appealed from was rendered on February 9, 1959, and an order denying rehearing was entered on March 9, 1959. The Notice of Appeal to The Supreme Court of The United States was filed on June 4, 1959, with the Clerk of the Supreme Court of the State of Mississippi, the court possessed of the record.

iii) The statutory provision believed to confer on this court jurisdiction of the appeal is 28 USC, Section 1257(2).

iv) The cases believed to sustain the jurisdiction of this court in this appeal are, among others, the following:

Staub v. *City of Baxley*, 355 U. S. 313, 78 S. Ct. 277, 2 L. ed 2nd 302;

Society for Savings in the City of Cleveland v. *Bowers*, 349 U. S. 143, 75 S. Ct. 607, 99 L. ed. 950;

Atchison, T. & S. F. Ry. Co. v. *Public Utilities Comm.*, 346 U. S. 346, 74 S. Ct. 92, 98 L. ed. ....

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Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. ed. 239;

Seismograph Serv. Corp. v. *Bureau of Revenue*, 293 P. 2d 977.

v) The statute of the State of Mississippi whose validity is involved is Section 10110, Mississippi Code of 1942, as supplemented by the administrative provisions of Sections 10111, 10120 and 10121, all being provisions of Title 40, Chapter 3, Division 1, Mississippi Code of 1942, of which the pertinent parts are as follows:

10110. "Upon every person engaging * * * in this state in the business of contracting for a fixed price, commission, fee or wage to * * * explore, test, survey * * * there is hereby levied and shall be collected a tax on account of the business engaged in equal to one per cent of the total of the contract price, or the compensation received. * * *"

"Provided, further, that where any person engaged in any business on which a tax is levied in Section 2-f (Section 10111) of this act, also qualifies as a contractor, * * * such person shall likewise pay the tax imposed by this section * * * in lieu of the tax imposed by section 2-f (Section 10111) of this act. * * *"

* * * * * * * *

10111. "Upon every person engaging or continuing within this state in any of the following businesses, there is likewise hereby levied and shall be collected a tax on account of the business engaged in

equal to two per cent of the gross income of the business: * * * Services performed in connection with the surveying, exploring, developing, producing, distributing or testing of oil, gas and other mineral resources, not elsewhere taxed, * * *"

* * * * * * * * *

10120. "It shall be the duty of every person taxable under this act to keep and preserve for a period of three (3) years adequate records of the gross income, gross receipts or gross proceeds of sales of the business, including all invoices of merchandise purchased all bank statements and cancelled checks, and all other books or accounts as may be necessary to determine the amount of tax for which he is liable * * *."

* * * * * * * * *

10121. "If adequate records of the gross income or gross proceeds of sales are not maintained or invoices preserved as provided herein * * * the commissioner may make additional returns and assessments from the best information available * * *."

(c) Questions Presented by Appeal.

The questions presented by this appeal are as follows:

i) Whether the unapportioned tax levied and collected from appellant, Seismograph Service Corporation, under Section 10110, Mississppi Code of 1942, was levied upon the gross receipts from a unitary and integral business in interstate commerce or from a local activity in Mississippi.

ii) Whether the imposition of the tax levied under Section 10110, Mississippi Code of 1942, without apportionment upon the gross receipts from appellant's business activities was unlawful as a violation of Article 1,

Clause 8 of the federal Constitution and/or the Due Process Clause of the Fourteenth Amendment thereto.

iii) Whether appellant's failure to keep records arbitrarily apportioning to Mississippi a part of its gross receipts from interstate commerce, when neither the taxing statute nor the record-keeping provisions thereof prescribe a formula for apportionment, justified the levy and collection of the tax upon all of such gross receipts.

iv) Whether the Supreme Court of the State of Mississippi erred in holding contrary to appellant's contentions with respect to each of the foregoing questions.

(d) Statement of the Case Showing the Manner in Which Federal Questions Raised.

The appellant, Seismograph Service Corporation, a Delaware corporation, has its principal office at Tulsa, Oklahoma. Its principal business is that of professional consultation upon geological and geophysical problems encountered by the oil industry throughout the United States and many foreign countries. Its services are rendered under contracts with its clients by which it agrees to furnish complete geophysical information and advice as to the subsurface formations of the earth in any given area. The primary matter which its clients seek is a finished map of the designated areas indicating by contours of relative depth the attitude of underlying sedimentary beds and other geological characteristics of the earth's crust. Such map is to be supplemented by a report containing detailed explanatory matter, corroborative geological information and recommendations for

the location of drilling sites. The finished map with the supplementing report is the product of appellant's services and is relied upon by the client in making business decisions.

In order to prepare the map and supplementary information required by the contract with the client, the appellant dispatches a technical crew to the designated area for the purpose of gathering scientific data and information by the physical operation of specialized equipment. The information and data gathered and recorded in such operations is then forwarded to the appellant's main offices in Tulsa, Oklahoma, where it is interpreted in the light of the world-wide experience of expert geophysicists assembled there. On the basis of these interpretations, a final map is drafted upon which is shown the contours of the underlying structures and a final report is written, supplementing and explaining the basis upon which the map is drawn. The submission to the client of the finished map and supplementary report constitutes the fulfillment of the obligations of the appellant under its contract.

Appellant performed its services on behalf of its clients who designated areas in the State of Mississippi on the same basis and in the same manner as described above. In brief, it gathered the raw information in Mississippi and sent it to Oklahoma for interpretation and presentation in the form required by its agreement. All such activities were performed under written contracts which specified a contract fee keyed to the length of time the field units were in operation. There was no division

of the contract fees between field operations and main office interpretation and final presentation. Only one fee was charged for the whole service. As to the activities involved in this case, each contract was made and entered into outside the State of Mississippi, each final map, interpretation and final report was delivered outside the State of Mississippi and no client was a resident of the State of Mississippi. The field units which operated in Mississippi were dispatched from Tulsa, Oklahoma, and were withdrawn upon completion of the field work. No permanent establishment was maintained by appellant in the State of Mississippi.

The appellee, through its agents, levied and collected taxes under Section 10110, Mississippi Code of 1942, upon appellant's gross receipts from the performance of services relating to lands lying in the State of Mississippi during the years 1951 and 1952. Appellant in due course brought suit to recover such taxes paid alleging, among other things; that assessment and collection of said taxes under the provisions of Section 10110, Mississippi Code of 1942, "was and is invalid and unlawful for the reasons (a) it constitutes a burdening of interstate commerce in violation of Article 1, Section 8 of the Constitution of the United States; (b) it constitutes the taking of private property without due process of law as prohibited by the Fourteenth Amendment to the Constitution of the United States." (Declaration, Par. 14)

Appellee denied these allegations and upon trial of the issues thus made, the Trial Court rendered judgment for the appellant stating that "the action of the defendant in assessing and collecting the taxes complained of

in the Amended Bill of Complaint and amendment thereto was invalid and unlawful for the reasons that (A) said action constituted the burdening of interstate commerce in violation of Article 1, Section 8, of the Constitution of the United States, (B) said action constituted the taking of private property without due process of law as prohibited by the Fourteenth Amendment to the Constitution of the United States." (Final Decree, Chancery Court, Hinds County, Mississippi.) On appeal to the Supreme Court of Mississippi appellee assigned as separate errors the holdings of the Trial Court on each of such constitutional grounds. The Supreme Court of Mississippi, acknowledging the lower court's holding, entered judgment of reversal stating, in its opinion, "We do not think that the assessment and collection of the tax constituted a burdening of interstate commerce within the meaning of the Commerce Clause of the Federal Constitution * * *." (Opinion, Supreme Court of Mississippi.)

In due course appellant filed its petition for rehearing (called Suggestion of Error), asserting, among other things, that "the Court concluded as a matter of law that the tax in question was not a burden on interstate commerce because there could not have been an additional exaction of tax on the same income by the State of Oklahoma. It is respectfully submitted that the Court has erred in this conclusion by reason of its error in attributing the appellee's income entirely to its field activities in Mississippi." (Suggeston of Error) The Supreme Court of Mississippi denied this petition for rehearing without opinion.

In view of the foregoing statement of the case and references to the pleadings and the judgments rendered by the Trial Court as well as the Supreme Court of Mississippi, it is respectfully submitted that the rulings of such courts were of a nature to bring this case within the statutory provisions believed to confer jurisdiction on this Court.

(e) Grounds on Which It Is Contended That the Federal Questions Are Substantial.

The tax complained of in this case was levied and collected by the State Tax Commission over the appellant's protest that the taxing statute, if so applied, was in violation of the Commerce Clause and the Fourteenth Amendment to the Constitution of the United States. This Court has said that the order of such a commission, being an instrumentality of the state and applying a state statute, "must be treated as an act of the legislature for purpose of determining our jurisdiction under 28 USC, Sec. 1257(2)." *Atchison, T. and S. F. Ry. Co.* v. *Public Utilities Comm.* 346 U. S. 346, 74 S. Ct. 92, 94, 98 L. ed. . . .

The Supreme Court of Mississippi upheld the action of the State Tax Commission under the state statute, reversing the Trial Court's judgment that the same was unlawful under the Federal Constitution. The decision of a state court enforcing a state statute of general scope against a particular transaction as to which there was a timely insistence that, if so applied, the statute was void under the Federal Constitution necessarily affirms the validity of the statute as so applied and the judgment is therefore reviewable by appeal, as here contended. See

Fisk v. Kansas, 274 U. S. 380, 385, 47 S. Ct. 655, 71 L. ed. 1108.

The appellant contended throughout that the transactions involved constituted interstate commerce, that the gross receipts taxed were derived from such transactions as a unitary and inseparable business in interstate commerce and that the tax fell without apportionment upon the proceeds of such interstate commerce and constituted the taking of property without due process of law. The appellee contended and the Supreme Court of Mississippi agreed, that the gross receipts taxed were derived from local activities in the State of Mississippi and thus violated no constitutional limitations. In *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653 68 S. Ct. 1260, 92 L. ed. 1633, it was recited that the state court passed upon the constitutional issues and expressly held that "there is no constitutional objection to taxation of total receipts here. This is not interstate commerce . . . ." This Court took jurisdiction of the case on the appeal under the equivalent of 28 U. S. C. 1257(2). It is of no consequence here that the state court concluded that there was no violation of the Constitution on the basis that there was no interstate commerce involved. This Court has said: "Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted." *Carpenter* v. *Shaw*, 280 U. S. 363, 367, 50 S. Ct. 121, 123. "We must judge the true nature of this tax in terms of the rights and liabilities which

the statute as construed creates. * * * The court's mere conclusion that the tax is imposed on the depositors is no more than a characterization of the tax." *Society for Savings in City of Cleveland* v. *Bowers*, 249 U. S. 143, 150, 75 S. Ct. 607, 611, 99 L. ed. 950.

In this case the record is replete with evidence of the unitary and inseparable nature of the interstate commerce in which appellant was engaged as well as evidence that the gross receipts taxed were derived as unallocable income from such commerce. The Trial Court upheld the contentions of appellant with respect to this evidence without exception. The Supreme Court of Mississippi acknowledged in its opinion that there was no conflict in the evidence as to any material fact, stating that "we are not therefore confronted with the question of whether or not any finding of fact by the Trial Court is manifestly wrong as being against the overwhelming weight of the evidence." This Court has said in *Fiske* v. *Kansas*, *supra*, that it will review the findings of fact by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary in order to pass upon the federal question to analyze the facts. The cases in which this Court has acknowledged jurisdiction on appeal to review the facts to determine whether a tax complained of falls upon interstate commerce or upon a local activity are too numerous to require citation here.

It is further noted that the decision of the Supreme Court of Mississippi upholding the validity of the taxing

statute is in direct conflict with the decision of the Supreme Court of New Mexico with respect to a taxing statute of that state which, as applied to appellant there, was identical in effect for all intents and purposes. See *Seismograph Service Corp. v. Bureau of Revenue*, 293 P. 2d 977.

As further grounds for reversing the Trial Court the Supreme Court of Mississippi held that appellant's failure to keep records disclosing by its own arbitrary allocation the portion of its gross receipts which should be subjected to the tax in question defeated its contentions that the tax is unlawful. The Court in effect thus demands that the appellant by its records devise some means of apportioning its income from a unitary business in interstate commerce where no formula for apportionment is provided by the statute under which the tax was levied. This attempt to circumvent federal rights upon non-federal grounds has been dealt with by this Court before. In *Staub v. City of Baxley*, 355 U. S. 313, 319, 78 S. Ct. 277 281, 2 L. ed. 2d 302, it was said that, "The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality because he has not yielded to its demands." And, in *Meyer, Auditor, State of Oklahoma v. Wells-Fargo and Co.*, 223 U. S. 298, 32 S. Ct. 218, 56 L. ed. 445, it was held that "Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

The issues brought before this Court by this appeal requires a determination as to whether a) appellant's gross receipts in question were derived from the performance of a unitary and integral business in interstate commerce and b) were subjected to the gross receipts tax without apportionment. If so determined, then it would appear that the taxing statute and the assessment and collection of the tax here involved must be held unlawful and violative of the Commerce Clause and the Fourteenth Amendment to the Federal Constitution under the long line of cases in which this Court has consistently declared that "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce." *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 58 S. Ct. 913, 82 L. ed. 1365; *Freeman* v. *Hewitt*, 329 U. S. 249, 67 S. Ct. 274, 91 L. ed. 265; *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80, 68 S. Ct. 1475, 92 L. ed. 1832; *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U. S. 157, 74 S. Ct. 396, 98 L. ed. 583.

We respectfully submit that these determinations and the questions to which they pertain are so substantial as to require plenary consideration by this Court with briefs on the merits and oral argument for their resolution.

Conclusion.

It it respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal under 28 U. S. C., Sec. 1257(2).

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APPENDIX

Appendix "A."

IN THE SUPREME COURT OF MISSISSIPPI

No. 40,987

NOEL MONAGHAN, CHAIRMAN, STATE TAX COMMISSION,

vs.

SEISMOGRAPH SERVICE CORPORATION.

McGehee, Chief Justice:

This suit was filed by the appellee, Seismograph Service Corporation, incorporated under the laws of Delaware and having its principal office and place of business at Tulsa, Oklahoma, where it was maintaining such office and place of business during the taxing period in question in this case. The suit was filed against the Chairman of the State Tax Commission under the authority of Section 10124, Miss. Code of 1942, Recompiled, which provides, among other things, that "Any person improperly charged with any tax imposed by this act, and required to pay the same, may recover the amount paid together with interest, in any proper action or suit against the commissioner for the amount paid into the State Treasury * * *." The Act is known as the Sales Tax Law of this State but the same covers tax on compensation received for services rendered therein.

The incidence of the tax is upon the local activity and the protection afforded that activity by the laws of this State. While the tax in this case was originally predicated upon Section 10111, Miss. Code of 1942, Recompiled, which provides for a tax equal to 2% of the gross income of the business done in this State, the assessment herein was actually made under Section 10110 of the Miss. Code of 1942, Annotated, which provides a lesser rate of tax. Of course no point is made by the appellee-taxpayer on the specific ground that it was charged a tax at the rate of 1% on the assessment under the latter statute instead of 2% under said Section 10111.

Section 10111, Miss. Code of 1942 Recompiled, provides in part, as follows: "(1) Upon every person engaging or continuing within this state in any of the following businesses, there is likewise hereby levied and shall be collected a tax on account of the business engaged in equal to two per cent of the gross income of the business: * * * Services performed in connection with the surveying, exploring, developing, producing, distributing or testing of oil, gas, and other mineral resources, not elsewhere taxed."

The appellee Seismograph Service Corporation was, during the taxing period in question, engaged in the making of seismographic surveys, with considerable equipment and personnel for the gathering of data for the location of oil and gas in Mississippi under written contracts with the California Company of New Orleans, Louisiana, the Gulf Oil Corporation of Houston, Texas,

the Marshal Young Company of Fort Worth, Texas, and the Skelly Oil Company of Tulsa, Oklahoma and in which written contracts the oil company is referred to as the "CLIENT". The appellee Seismograph Service Corporation, under the terms of the contract, was to furnish the scientific equipment necessary for the exploration of the area of land in this State designated by the client for the exploration, was to furnish the personnel for conducting the operation, and was to be reimbursed for only expendable material used in the seismographic survey, such as dynamite, etc.

The procedure in conducting the seismographic survey was for the appellee Seismograph Service Corporation to employ in the work what is called a "Basic Unit" and a "Drilling Unit," comprised of the equipment and personnel listed in exhibits to the written contract. The tax in question is based upon the gross receipts paid to the appellee by the clients for the work done by these two units in this State, which correspond with the amount of income reported by the appellee Seismograph Service Corporation to the State Tax Commission for the period in question.

It was franky admitted by the President of the Seismograph Service Corporation in his testimony at the trial that no charge *as such* was made in any of the invoices or mentioned in the contracts as to any services rendered outside of this State.

He referred to the scientific equipment used by the basic unit which included "the recording truck, which is

connected by cable to all the detectors laid out in a straight line on the ground." He testified that "Not too far away is the shooting truck, which is connected by telephone cable to the recording truck, and again an electric line goes from the shooting truck to the shot-hole for the detonation of the dynamite." And further that "On word from the operator in the recording truck the shooter pushes the blaster, and sets off the blast of dynamite." He also told the court that the holes were drilled by the drilling unit to a depth of about sixty feet that the hole was about four inches in diameter, and that the dynamite was placed at the bottom of this hole. The basic unit was comprised of a party chief, two computers, a party chief's car, and all necessary calculating, drafting and mapping equipment; that as a part of the crew there was an observer, assistant observer, a recorder's helper, a shooter and a shooter's helper; that the set of 24-trace seismic recording instruments included not more than fifty geophones, mounted on a standard truck, a water tank and all normal shooting accessories mounted on a standard truck; that the surveying unit consisted of a surveyor, rodman, a service automobile and a complete set of surveying instruments; and a list of the equipment and personnel of a drilling unit was also attached as an exhibit to one of the contracts which was introduced as being typical of all of the contracts involved between the Seismograph Service Corporation and its clients. He admitted that the work done in this State was by the basic and drilling units, and that what the appellee got out of the

field operation were the surveyor's notes, the surveyor's map of the locations, the observer's report of his records, the shooter's report as to the amount of dynamite he shot and that the field crew would make certain preliminary calculations and computations and a preliminary progress map, and that all of the information, maps and surveys were then mailed to the home office at Tulsa, Oklahoma, where there was a pool of expert geologists and geophysicists who interpreted the results of the data gathered by the basic units and the drilling units in Mississippi.

As required by the written contract the appellee would then make a report to the client as to their interpretations of the results of the work done in Mississippi by the basic unit and the drilling unit,

The President of the appellee-corporation, Mr. C. S. Wesby, further testified, among other things, as follows: Q. "Now, Mr. Wesby, as a matter of practice in your experience with your company has the company ever set a separate fee for the field work and for the interpretation work? A. No, it has not." and further: "Q. Now, your basic unit confines its work to the shooting of the holes on location and to the correct preparation of preliminary maps, as you say—A. That's correct. Q. In their surveying, do they not? A. That's correct. * * * Q. Now, that drilling unit also is a unit that is on location (evidently meaning in the area assigned to the appellee for seismographic exploration in Mississippi) and drills the holes in which the dynamite is placed for detonation, is it

not? A. That's correct. Q. Both the basic unit and drill units are used at work on location, are they not? A. That's correct."

Mr. Wesby was also asked: "Q. Under that provision of the contract you charged for the basic unit $8,200 a month, did you not? A. Yes, sir. Q. And under that contract you charged for the drill unit in accordance with the charges as stated in schedule (b) of the contract, did you not? A. That's correct. Q. And that was the only charge you made under that contract for services were they not? A. Yes, sir. Q. There was no charge made for any interpretative work, was there? A. The interpretative —Q. As such? A. As set out in an invoice? Q. As set out in the contract? A. The basic fee covers the interpretation. Q. Let me ask you my question again. There is no charge as such for interpretation work in the—on the face of the contract, is there, Mr Wesby? A. No, that's correct. • • • Q. All right, show me some place else in the contract where there are charges made for other work. A. No, there are no other charges but they are obligations that we—Q. I know—They were covered by these fees • • • Q. I am asking you the question on the face of the contract, are there any other charges made other than those for the basic unit and the drill unit? A. No, sir. Q. Now, both the basic unit and drill unit are units that operate locally, are they not, Mr. Wesby? A. That's correct." The witness, however, further stated: "It has grown up in the seismographic industry from the very beginning that there are two parts in the seismographic survey that I

have mentioned, that is, going out and getting the physical data and then following it up by the interpretation. * * *"

Notwithstanding that the president of the appellee corporation contended that there are two parts of a seismographic survey, part of the work done in the field in Mississippi and the remainder, the interpretation in Tulsa, Oklahoma, of the data gathered in Mississippi, neither the written contract nor the invoices, which were present but not introduced, in connection with the seismographic survey in Mississippi disclose that any charge was made for the interpretative work done at the home office at Tulsa, Oklahoma. The tax was assessed on the basis of the income reported by the appellee to the State Tax Commission in Mississippi. Sec. 10120, Code of 1942, Recompiled, makes it the duty of every person taxable under the Act to keep and preserve for a period of three years adequate records of the gross income, gross receipts or proceeds of sales of the business, etc.; and Sec. 10121, Code of 1942, Recompiled, provides that: "If adequate records of the gross income or gross receipts of sales are not maintained, or invoices preserved as provided herein * * * the Commisioner may make * * * assessments from the best information obtainable and shall give notice by registered mail of such returns and assessments, and such return and assessments shall be prima facie correct for purposes of this Act." The appellee evidently got notice, since it paid the tax, under protest, on the assessment.

The assessments, as previously stated, were made and the tax levied on the basis of the income earned by only the basic unit and the drilling unit in this state and the tax was paid in the sum of $11,176.88 by the appellee-taxpayer. But whether it was paid under protest or voluntarily is immaterial under the Act since it provides that any person improperly charged with any tax imposed by the Act, and required to pay the same, may recover the amount paid together with interest thereon.

The trial court sustained a special demurrer as to $9,003.50 of the amount paid by the taxpayer for the reason that this amount of the tax was passed on to, and collected from, the clients, and a taxpayer who has paid an improper tax into the state treasury can only recover such part thereof as was actually borne by such taxpayer. The decree in this case in favor of the appellee Seismograph Service Corporation was therefore for only the sum of $2,678.93, with interest from the date of payment until the date of the decree in the amount of $626.50, and the decree provides for interest at the legal rate of 6% thereafter until paid.

On the question of whether or not the trial court was correct in rendering a decree in favor of the appellee for a refund of the portion of the tax last above mentioned, the chancellor made no separate finding of fact, but held as a matter of law that the assessment of this tax by the State Tax Commission (a) constituted a burdening of Interstate Commerce in violation of Article I; Section 8 of the Constitution of the United States; and

(b) that the assessment and collection of the tax constituted the taking of private property without due process of law as prohibited by the Fourteenth Amendment to the Constitution of the United States.

We are of the opinion that the only questions presented on this appeal are questions of law there being no conflict in the evidence as to any material fact, that is to say, the issue here is whether either of the grounds upon which the decree was based is correct. We are not therefore confronted with the question of whether or not any finding of fact by the trial court is manifestly wrong as being against the overwhelming weight of the evidence.

We do not think that the assessment and collection of the tax constituted a burdening of interstate commerce within the meaning of the Commerce Clause of the Federal Constitution as construed by the Supreme Court of the United States in upholding numerous decisions of this Court wherein we have upheld the tax under the Act in question, as a tax upon a local activity engaged in within this State by the person or corporation against whom the tax is assessed.

The appellee relies strongly upon the case of Freeman v. Hewit, 91 L. ed. 265, 329 U. S. 249, decided in 1946, involving the sale of securities in interstate commerce. However, if that decision be applicable, and we do not think that it is, since there was no local activity such as manufacturing or exploration as a business involved, the Supreme Court of the United States on June 30, 1949, upheld the decision of this Court in the case of

Interstate Oil Pipe Line Company v. Stone, Chairman, State Tax Commission, reported in 203 Miss. 715, 35 So. 2d 73, 36 So. 2d 142, 93 L. ed. 1615, 337 U. S. 662, in which was involved a tax under our present statute on the local activity of the Interstate Oil Pipe Line Company which line extended from the lease tanks in oil fields in south Mississippi to a point on a railroad where the oil was loaded into railroad tank cars and shipped in inter state commerce. The tax assessed by this State against the local activity of this pipeline was upheld by the Supreme Court of the United States notwithstanding that the transportation of the oil to the railroad was an integral part of its transportation from the oil fields to points outside of this State, and where the transportation by the Interstate Oil Pipe Line Company from the oil field in this State to the point on the railroad in this State was a local activity and the transportation by the railroad thence to points out of the State was interstate commerce. See also, Stone, Chairman, State Tax Commission v. Stapling Machines Co., 220 Miss 470, 71 So. 2d 205, 348 U. S. 802, 99 L. ed. 470; and Stone, Chairman, State Tax Commission v. Stapling Machine Co., 221 Miss. 555, 73 So. 2d 123, 348 U. S. 907, 99 L. ed. 711.

In the case of Cook v. Stone, Chairman of State Tax Commission, 192 Miss. 219, 5 So. 2d 223, we held that a tax against a contractor was based on the local activity and was for the protection afforded by the State during the progress of the work, and was a valid tax and in the course of the opinion, we said: "* * * The tax, we repeat, is upon the local activity of doing this work, not upon the

issue of its ultimate acceptance and the payment thereof as a finished product."

In the case of Stone, Chairman of the State Tax Commission v. York Ice Machinery Corporation, 193 Miss. 638, 10 So. 2d 380, but which the taxpayer did not see fit to appeal, there was involved a tax against the local activity for the installation, adjustment and testing of certain air conditioning systems in buildings in this State, where the air conditioning systems had been manufactured out of this State and shipped here in interstate commerce, and we held that although the installation, adjustment and testing of the air conditioning systems constituted a substantial part of the performance of the contract for the sale of the machinery and equipment which was shipped here in interstate commerce the local activity of the experts who installed, adjusted and tested the systems in this State was subject to the tax and that the same was not a prohibitive burden on interstate commerce. We further held that the fact that the installation, adjustment and testing of the air conditioning systems constituted a substantial portion of the performance of the contract of sale as a condition precedent to final acceptance by the purchasers, did not prevent the local activity from being subject to the tax.

We do not think that the case of Gross Income Tax Division, Indiana Department of State Revenue, State of Indiana v. Surface Combustion Corporation 232 Ind. 100, 111 N. E. 2d 50, certiorari denied, 346 U. S. 829, 98 L. ed. 353, is in conflict with the decision being rendered by

us in the case at bar. The appellee in its brief recognized that "a tax on an interstate sale, coupled with the installation services may be *invalid* where the skill and peculiar knowledge required in such installation services were *not* such as were 'intrinsically related to and inherently a part of the sale * * *'" (Emphasis supplied). But here the work done in Mississippi was "intrinsically related to and inherently a part of" the operation in question. In fact, the work done in this State was essential to the interpretative work done in the appellee's home office at Tulsa, Oklahoma, but we see no reason why the appellee should not have separated the charges for the value of the work done in Mississippi from the va[illegible] of the work done in Tulsa, Oklahoma, but which it failed to do. Moreover, we think that the requirement of the statute for the taxpayer to keep adequate records is a reasonable exercise of the legislative power and was an essential requirement to enable the State Tax Commissioner to properly administer the Sales (or service) Tax Law.

In the case of McGoldrick v. Berwind-White Coal Mining Company 309 U. S. 32, 33, 60 S. Ct. 383, 34 L. ed. 565, which we cited in the case of Stone, State Tax Commissioner v. York Ice Machinery Corporation, supra, held, among other things, that: "* * * it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business. Western Live Stock v. Bureau of Revenue, 30[illegible]

U. S. 250, 254, 58 S. Ct. 546, 548, 82 L. ed. 823, 115 A. L. R. 944. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless falls short of the regulation of the commerce which the Constitution leaves to Congress."

In the instant case we are unable to conceive how this tax unconstitutionally interferes with interstate commerce or can amount to double taxation, since the State of Oklahoma would be without power to tax the local activity of the appellee in this State, which is here involved. By the expedient of keeping adequate records by the appellee, the appellant State Tax Commission would have been able to apportion the tax on the local activity so that it would not embrace any receipts for the services rendered by the taxpayer in the State of Oklahoma in the interpretation of the data obtained here as to subsurface structures. But according to the undisputed testimony in this record, no separate charge was made *as such* by the appellee for the services rendered in Oklahoma; the tax was imposed upon the gross receipts and income reported by the appellee to the State Tax Commission of Mississippi "from the best information obtainable," to wit: the report of the appellee of its income made to the State Tax Commission from the activities of the basic and drilling units in this State. A taxpayer engaged in local activities in this State that is connected

with interstate commerce should not be permitted to commingle its income received from activities in another state with the income received from activities in this State, and then be heard to complain that the tax is imposed upon unapportioned income, where such unapportionment is due to the failure of the taxpayer to comply with the law in regard to keeping adequate records as to the income received from activities performed in this State, and where the taxpayer may thereby escape paying tax on this income anywhere.

In the case of Freeman v. Hewit, supra, the Supreme Court of the United States was not in accord with the view of one of the justices who was apprehensive that the Court was there reversing the trend of its former decisions in regard to the right of a state to impose a tax upon a local activity. In fact, no local activity of any consequence was involved in that case.

Again, the burden was on the appellee to show that the tax here involved violated the commerce clause of the Federal Constitution. To meet that burden, the appellee only undertook to show that the services rendered in Oklahoma, though not charged for under the contracts and invoices here involved, were a part of, and included in, the base fee collected from the client in connection with the local activities in this State; but the appellee, which alone knew the facts, failed to show what portion of the base fee should be allocated to the services rendered in Okahoma, and failed to disclose the information upon which the tax claimed for activities in this State could

be apportioned, a part to Mississippi and a part to Oklahoma—in compliance with the reasonable requirement of our statute, which made it necessary for the State Tax Commissioner to make the assessment on the best information obtainable. The Commissioner was justified in using the information furnished by the taxpayer to the State Tax Commission in its return of its income received for its activities in this State. In response to Interrogatory No. 3, contained in the appellee's pleadings, the appellee conceded upon the trial that the gross income reflected on its state income tax return here was the same figure upon which the tax here involved was imposed.

The appellee in the instant case is not in position to complain that the tax in question was assessed against unapportioned income (If such was the case), since the State Tax Commissioner, as aforesaid, was not furnished information upon which he could determine how much the taxpayer owed so as to enable him to allocate any definite portion of the gross receipts reported to him as income of the taxpayer in this State, other than by the method of imposing the tax upon the income reported to the Commission by the taxpayer as income earned in this State. If the taxpayer is having to pay more taxes on the amount received for services performed in this State than it would have had to pay thereon if a part of its total income had been apportioned to the Tulsa, Oklahoma office, the increased exaction would be due to the failure of the taxpayer to keep adequate records in order that the proper allocation could be made.

The only records shown to have been kept by the taxpayer were the written contracts introduced in evidence and the invoices presented, but not introduced in evidence, for the work done and the price received, and there was nothing in the contract or invoice to show that any part of the charge was for services performed in Oklahoma, as hereinbefore stated, notwithstanding that the president of appellee-corporation testified that the charges for the interpretative services in Tulsa, Oklahoma, were included in the basic fee of $1,975 per week for the basic unit and $450 for the drilling unit. As heretofore shown, the Act in question required that this and all other taxpayers should keep adequate records in order that the Commissioner may determine how much the taxpayer owes the State.

It is a matter of common knowledge that the operation of these two units by the appellee and others engaged in seismograph explorations in this State is a local activity of considerable magnitude and is carried on throughout the State.

We recognize that the Supreme Court of New Mexico has in the case of Seismograph Service Corporation v. Bureau of Internal Revenue, 293 P. 2d 977, reached a contrary conclusion as to whether or not such a tax here involved was a burden on interstate commerce, and while we have great respect for the decisions of other state courts we feel it our duty to follow the rule that they are not necessarily binding on this Court, according to what is said in 21 C. J. S., Sec. 204, p. 356; and Mast, Fox and

Company v. Stover Mfg. Company, 177 U. S. 485, 44 L. ed. 856. We are like the Supreme Court of New Mexico, endeavoring to follow the previous decisions of our Court, some of which have been affirmed by the Supreme Court of the United States, as hereinbefore shown.

As hereinbefore stated, since the unapportionment of the tax as between the work done in Mississippi and that done in Okahoma is due to the failure of the taxpayer to keep such records as would enable the Commissioner to make the proper apportionment, the taxpayer is in no position to complain that the State Tax Commission assessed it on the basis of its reported earnings in this State—"the best information obtainable." There was not, and could not have been, an additional exaction of such a tax, on the same income from these local activities made by the State of Oklahoma.

We are therefore of the opinion that the decree of the trial court should be reversed and the case dismissed.

Reversed and judgment here for Appellant. Lee, Kyle, Holmes and Arrington, JJ., concur.

Appendix "B."

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 51,242

SEISMOGRAPH SERVICE CORPORATION,
Complainant,
vs.
NOEL MONAGHAN, CHAIRMAN STATE TAX COMMISSION, Defendant.

FINAL DECREE

This cause coming on to be heard on amended bill of complaint, answer to amended bill of compaint, amendment to amended bill of compaint, and answer thereto, stipulation of counsel, oral and documentary evidence; and the Court having heard all of the same together with arguments of counsel, and being now fully advised in the premises, the Court is of the opinion and so finds that the action of the defendant in assessing and collecting the taxes complained of in the amended bill of complaint and amendment thereto was invalid and unlawful for the reasons that:

(A) Said action constituted a burdening of interstate commerce in violation of Article 1, Section 8, of the Constitution of the United States;

(B) Said action constituted the taking of private property without due process of law as prohibited by the 14th Amendment to the Constitution of the United States.

The Court further finds that the complainant is entitled to the relief prayed for in its bill.

It is therefore hereby ordered, adjudged and decreed that said complainant do have and recover of and from the said defendant the sum of $2,678.93 together with interest to this date in the amount of $626.50 and interest on the principal amount at the rate of 6% from this date until paid together with all costs herein.

The defendant feeling aggrieved at this order and praying for an appeal the same is hereby granted.

The complainant feeling aggrieved at the order of this Court sustaining the special demurrer of the defendant and praying for a cross-appeal the same is hereby granted.

ORDERED, ADJUDGED AND DECREED on this the ..... day of March, 1958.

Chancellor

ILE COPY

Office Supreme Court, U.S.
FILED
AUG 21 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 265

SEISMOGRAPH SERVICE CORPORATION — Appellant

vs.

NOEL MONAGHAN, CHAIRMAN STATE TAX COMMISSION — Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MOTION TO DISMISS

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No. 265

IN THE

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SEISMOGRAPH SERVICE CORPORATION — Appellant

vs.

NOEL MONAGHAN, CHAIRMAN STATE TAX COMMISSION — Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal in this case be dismissed and that the final judgment of the Supreme Court of Mississippi be affirmed, on the grounds that this cause does not present a substantial federal question and the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

STATEMENT OF FACTS AND ISSUES OF APPEAL

This case originated as a suit for refund of sales tax (gross income tax), the assessment of which was made against the appellant by the State Tax Commission of Mississippi. Originally the assessment was made under

Section 10111, *Mississippi Code of* 1942, (Appendix "A") but because of the lesser tax rate the actual assessment was made under *Section* 10110, *Mississippi Code of* 1942, (Appendix "B"). Trial in the lower court resulted in judgment in favor of the appellant, which judgment was by the Supreme Court of Mississippi reversed and rendered in favor of appellee.

This is an appeal from the decision rendered by the Supreme Court of Mississippi on the 9th day of February, 1959, and reported in 108 So. (2d) 721, which case has not yet been reported in the official reports. The decision of the Supreme Court of Mississippi was that the appellant was not entitled to refund of taxes paid the State of Mississippi on its gross income earned from seismic work performed within the State. The Court further held that the assessment did not violate the commerce clause of the Federal Constitution. The Suggestion of Error was overruled on the 9th day of March, 1959, and is unreported. The assessment complained of was made for operations carried on within the State of Mississippi during the years 1951 and 1952. Appellant's position that the assessment is invalid is based upon the contention that part of its operations were carried on within the State of Oklahoma, and since there was no formula for apportionment provided for in the Mississippi statute, the assessment was claimed to be invalid.

Appellant, a Delaware corporation, with its principal office and place of business in Tulsa, Oklahoma, maintained no branch office within the State of Mississippi, except during the period of time when its seismic crews were working within the State, at which time appellant operated within the State a mobile office unit as part of the seismic unit carrying on appellant's operation therein.

None of the contracts between appellant and its clients were executed within the State of Mississippi nor was payment for the services performed made within the boundaries of the State.

A typical contract between appellant and its clients provides that it was a contract for the conducting of geophysical surveys by appellant on behalf of its clients. Appellant's operations in the State of Mississippi were conducted by personnel and equipment units made up exclusively of what appellant designates as its Basic Unit and Drill Unit. The Basic Unit is composed of: (1) office unit and (2) recording and shooting units along with survey units. Under the terms of appellant's contracts clients had the right to request additional operating equipment and personnel, contract price for which was set forth in the contract. Compensation to appellant was based upon the operation of the Basic Unit. Under the aforesaid typical contract the price per week for fifty-five hours operation of the Basic Unit was $1,975.00 and the Drill Unit $450.00. Of course, there was a variance of this price from contract to contract but there was no variance of any of the contracts from the principle that appellant's charge for service was based entirely on the work done by the Basic Unit and Drill Unit operating entirely within the State of Mississippi with, of course, additional charges when optional equipment was used. In the event appellant's client requested additional hours work, compensation was based upon the contract price plus 20% on an hourly basis, based upon the number of hours the Basic or Drill Units were operated.

Although not offered in evidence, invoices for work done by the appellant showed charges only for the operation of the Basic Unit or the Drill Unit and no charge whatsoever for work claimed to be done either in Tulsa,

Oklahoma, or in any other place. This is true of all of the contracts involved in the suit, as was also true regarding the invoices for work done by appellant, but which invoices were not actually introduced into evidence.

The decision of the Supreme Court of Mississippi upholding the assessment and denying the refund was grounded upon the finding that appellant's operations were local activities, which the State of Mississippi had the right to tax.

II.

ARGUMENT

A STATE HAS THE RIGHT TO TAX LOCAL ACTIVITY CARRIED ON WITHIN ITS BORDERS

(1)

APPELLANT'S OPERATIONS ARE PURELY LOCAL

The incidence of the tax complained of is upon the local activity and protection afforded that activity by the laws of the State of Mississippi and has been so held by the State Supreme Court.

Cook v. Stone, 192 Miss. 219, 223, 5 So. (2d) 223:

> "... It is the local activity in doing the work in so far as he does, and for the protection afforded by the state during the progress thereof that the statutory remuneration is exacted of the contractor."

To the same effect:

Stone v. York Ice Machinery Corporation, 193 Miss. 638, 653, 10 So. (2d) 380;

Interstate Oil Pipe Line Co. v. Stone, 203 Miss. 715, 35 So. (2d) 73, 337 U. S. 662;

McKeigney (Stone) v. Dunn Bros., Inc., 224 Miss. 762, 80 So. (2d) 802, appeal dismissed 350 U. S. 877.

This court has consistently held that a State may tax local activity carried on within its borders even when such activity is related to but separate from interstate commerce. Such a tax is valid even though the exaction from the business of the taxpayer is precisely the same as though the tax had been levied upon interstate business itself.

Memphis Natural Gas Co. v. Stone, 335 U. S. 80, 87;
McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33.

In the enforcement of this tax against the appellant the amount of income attributable to Mississippi is calculated according to the amount which appellant itself reported as taxable income for state income tax purposes.

Wisconsin v. J. C. Penney Co., 311 U. S. 435, 440.

The entire record in this case shows that the tax was solely upon appellant's seismic activity within the State of Mississippi, which consisted of: surveying locations, drilling holes, exploding dynamite in the holes and measuring the time it took the shock waves to leave and return to the place of detonation. It will be noticed that all of this activity is of a purely local character and that all of it took place within the boundaries of the State of Mississippi.

This local work was performed by the use of what appellant denominates its Basic Unit and Drill Unit, both of which because of their nature were incapable of performing anything except local operations. All of appellant's records consisting of its contracts, which were introduced into evidence, and its invoices, which were not,

introduced into evidence, show that the entire charge made by appellant for its services was based entirely upon the operation of the Basic Unit and the Drill Unit. Not only were the charges based entirely upon the operation of the aforesaid units, but the entire charge was determined by computing the number of hours these units operated within this state. The record certainly does not bear out appellant's statement contained in its Jurisdictional Statement that, "Only one fee was charged for the whole service" (Jurisdictional Statement, page 7). True enough only one fee was charged but that fee was based entirely upon appellant's local operations and not for the whole service or completed job. In addition to this documentary evidence there was the testimony of appellant's president, who although contending that some of the general terms of the contract provided for charges for work done in Tulsa, Oklahoma, admitted that neither the contracts nor the invoices provided for specific or separate charges for work, which might be done in Tulsa.

It is respectfully submitted that if appellant decided in the conduct of its operations to make charge only for local services and to so keep its records, it cannot now be heard to say that the taxing authorities must come in and allocate that which by its own actions and records it has refused to allocate.

Mississippi statutes require taxpayers to keep records as may be necessary to determine the amount of tax for which he is liable (Appendix "C").

This is not a case where one fee is charged for a completed job, on the contrary the fee is charged solely and only for the work done in the State of Mississippi and this charge for work performed in Mississippi is that upon which the state predicates its tax.

Department of the State of Indiana v. Ingram-Richardson Manufacturing Co. of Indiana, 313 U. S. 252.

In regard to the case of *Seismograph Service Corporation v. Bureau of Revenue*, 293 Pac. (2d) 977, upon which appellant places so much reliance it may be noted that the opinion in that case does not indicate that appellant's charges for its services in New Mexico were entirely based upon the local operation of its Basic and Drill Units as was the case in Mississippi.

(2)

NEITHER EXECUTION NOR PAYMENT OF CONTRACT IN ANOTHER STATE CONSTITUTES INTERSTATE COMMERCE

All of appellant's contracts were executed in some state other than the State of Mississippi and payments under these contracts were not made in Mississippi but, of course, the work for which the charges were made was definitely done in the State of Mississippi.

Treasury of Indiana v. Wood Preserving Corporation, 313 U. S. 62, 67:

" . . . it cannot be said that respondent had a constitutional right to escape that burden (of taxation) by arranging to have the proceeds of its intrastate transactions paid to it in another State. . ." (Parenthesis ours).

Department of Treasury of the State of Indiana v. Ingram-Richardson Manufacturing Co. of Indiana, 313 U. S. 252, 254:

" . . . The fact that the orders for the enameling were obtained by respondent's agents and contracts were executed outside Indiana did not make the enameling process other than an intrastate activity and

any the less a proper subject for the application of the taxing statute. . ."

Executive direction of a local activity from out the State does not make of a local activity one in interstate commerce and is not sufficient to justify apportionment.

Crown Zellerbach Corporation v. State of Washington, 328 Pac. (2d) 884, appeal dismissed case No. 805 May 25, 1959, 3 L. Ed. (2d) 1029.

(3)

THE BURDEN OF PROOF IS ON APPELLANT

A taxpayer has the burden of proving that a state tax as applied fails to achieve a fair apportionment.

International Harvester Co. v. Evatt, 329 U. S. 416; 423;

Capitol Greyhound Lines v. Brice, 339 U. S. 542;

Norton v. Department of Revenue, 340 U. S. 534, 537

Appellant has not met the burden placed upon it by law. It has not shown just what work is performed in Tulsa and specifically regarding the contracts upon which the present suit is based there is no showing that any work whatsoever was done in Tulsa in regard to these specific contracts. The case without contradiction reveals that all of appellant's operations, for which a fee was charged, were performed entirely within the State of Mississippi. This is not a case of a tax laid by the state on gross receipts from interstate commerce which must be equitably apportioned, but is a case of a state laying a tax upon local activity which takes place entirely within the boundaries of the state. The fees charged by appellant were for work performed by the Basic and Drill Units, local work, for which appellant received the protec-

tion of the laws of the State of Mississippi and no other state.

Wherefore premises considered appellee prays that the appeal in this case be dismissed.

Respectfully submitted,

John E. Stone

JOHN E. STONE
Attorney for Appellee

APPENDIX "A"

Section 10111, Mississippi Code of 1942: (Prior to 1954 amendment)

Miscellaneous business.—(1) Upon every person engaging or continuing within this state in any of the following businesses, there is likewise hereby levied and shall be collected a tax on account of the business engaged in equal to two per cent of the gross income of the business:

Aeroplane repair and service shops
Automobile repair shops
Automobile garages
Automobile fender and body repair shops
Automobile service stations
Battery stations
Motorcycle repair shops
Billiard, pool and domino parlors
Bowling and ten pin alleys
Cleaning, pressing, and dyeing
Cold storage plants
Cold storage lockers
Cotton compresses
Cotton gins
Cotton warehouses
Custom creosoting, custom planing, custom sawing and any other custom processing for a fee
Electricians and all repairs of electrical equipment not elsewhere taxed
Foundries, machine or general repair shops not elsewhere taxed
Hotels

Jewelry and watch repairing
Laundries
Mattress renovators
Meat curing plants
Plumbers or pipefitters
Refrigerator repair shops
Radio repair shops
Shoe repair shops
Tourist camps, or courts
Tin and sheet metal repair shops
Vulcanizing and recapping of tires
Transfer business
Storage warehouses
Welding shops
Woodworking and wood turning repair shops
Renting or leasing of tangible personal property
Furniture repair and upholstery shops
Office and business machine repairs
Repairs to air conditioning
Elevator repairs
Photographers and film developers
Termite and pest control service
Storage lockers
Grading, excavating or landscaping

Services performed in connection with the surveying, exploring, developing, producing, distributing or testing of oil, gas, and other mineral resources, not elsewhere taxed:

Provided, however, that in computing the tax levied under this section, if the taxpayer is a natural person, and employs no assistant in rendering the service taxed,

there shall be deducted from the gross income of the taxpayer, so as to be taxed, so much thereof as has been received by him as compensation for personal services rendered by him in person to others, regardless of whether or not such personal service includes the incidental use of machinery, for a consideration (as distinguished from gross income received by the taxpayer as a result of the activities of his employees or other persons or services in connection with the operation of machines, or gross income or gross proceeds of sales derived from the production or sale of tangible personal property). Provided, however, that if any person exercising any privilege taxable under this section shall engage in any business activities which are taxable under any of the preceding sections of this act and shall be liable on account of such business activities for the payment of a tax under any such preceding section, no deduction for personal services shall be allowed in determining the measure of the tax imposed in such preceding section.

APPENDIX "B"

Section 10110, Mississippi Code of 1942: (Prior to 1955 amendment)

Contracting, etc.—Upon every person engaging or continuing in this state in the business of contracting for a fixed price, commission, fee or wage, to build, erect, construct, repair, grade, excavate, drill, explore, test, survey, mine, install in or add to any highway, street, sidewalk, bridge, culvert, sewer or water system, drainage, or dredging system, levee, levee system, or any part thereof, electric, or steam railway, reservoir or dam, hydraulic or power plant, electric lighting or power system, steam heating plant or system, transmission line, pipe line, tower dock, storage tank, wharf, excavation, grading, water wells, gas wells, oil wells, or any part thereof, when the gross amount of the total contract price, or the gross amount received as compensation exceeds the sum of three thousand dollars ($3,000.00), there is hereby levied and shall be collected a tax on account of the business engaged in equal to one per cent of the total of the contract price, or the compensation received. The tax imposed in this section is levied upon the prime contractor and shall be paid by him.

Provided, however, that a contractor performing contracts to erect any building, the contract price of which amounts to twenty-five thousand dollars ($25,000.00) or more, shall also operate under the provisions of this section when building, erecting, repairing, installing in or adding to any such building or structure not listed herein.

Provided, that where the work to be performed is sublet by the prime contractor to different persons, or in separate contracts to the same person, each person per-

forming any part of said work shall be liable for the amount of the tax which accrues on account of the work performed by such person, when the tax heretofore imposed has not been paid upon the whole contract by the prime contractor.

Provided, further, that where any person engaged in any business on which a tax is levied in section 2-f (§ 10111) of this act, also qualifies as a contractor, and contracts with the owner of any project to perform any services herein taxed, where the contract price or the compensation received exceeds the sum of three thousand dollars ($3,000.00), such person shall likewise pay the tax imposed by this section on account of said contract, in lieu of the tax imposed by section 2-f (§ 10111) of this act.

It is hereby declared to be the purpose of this section to impose a tax on the business of contracting within this state, in all instances where the total contract price or the compensation received amounts to more than three thousand dollars ($3,000.00), when the price to be paid or the compensation received for any services required or has required the use of equipment or tools of any kind, or the supplying of any material which has become an integral part of such contract. And to the end that the state may receive the tax due in every instance, any person entering into any contract, as defined in this section, where the total contract price, or the compensation received amounts to more than ten thousand dollars ($10,000.00) shall, before entering into the performance, of such contract, execute and file with the chairman of the state tax commission a good and valid bond in a surety company authorized to do business in this state, or with sufficient sureties to be approved by the commissioner, conditioned that all taxes which may accrue

to the State of Mississippi under this section on account of the execution of such contract will be paid when due, and the execution and filing of said bond shall be a condition precedent to commencing work on any contract in the State of Mississippi. Provided, however, that any taxpayer may pay the tax in advance on any contract in lieu of furnishing bond.

Every person failing either to procure the permit required by this act, or to execute the bond herein provided, or to pay the tax in advance, before beginning the performance of any contract shall be denied the right to perform such contract until he complies with such requirements, and the attorney general is hereby authorized to proceed by injunction, when requested by the commissioner so to do, to prevent by injunction any activity in the performance of such contract until either such permit is secured, or such bond is executed and filed, or such tax is paid in advance, and any temporary injunction enjoining the execution of such contract shall be granted without notice by any judge or chancellor now authorized by law to grant injunctions.

Provided, that where any person engaged in any business which is subject to the taxes levied in section 2-f (§ 10111) of this act, and who performs services for a contractor as defined in this section, may report the gross income from such services at the rate of one-eighth of one per cent in lieu of the two per cent rate levied in section 2-f (§ 10111). Provided, however, such services must be on the structure or improvement being erected or repaired and the contract must be taxable under this section.

APPENDIX "C"

Section 10120, Mississippi Code of 1942:

Taxpayer must keep records.—It shall be the duty of every person taxable under this act to keep and preserve for a period of three (3) years adequate records of the gross income, gross receipts or gross proceeds of sales of the business, including all invoices of merchandise purchased, all bank statements and cancelled checks, and all other books or accounts as may be necessary to determine the amount of tax for which he is liable. Said records shall be adequate in substance to conform with the provisions of this act and the regulations promulgated by the commissioner and all of such records shall be written in the English language. All records shall be open for examination at any time, by the commissioner or his duly authorized agent.

The records provided for in this section shall be kept at the taxpayer's principal place of business within this state, and failure to keep and allow examinations of such records shall subject the taxpayer to all the penalties of section 16 (§ 10133) of this act.

III.

CERTIFICATE

I, John E. Stone, attorney for the appellee in this cause, certify that I have this day mailed, postage prepaid to both Donald C. Beelar, World Center Building, 16th and K Street, N. W., Washington 6, D. C., and Joseph L. Hull, Jr., P. O. Box 1590, Tulsa, Oklahoma, true copies of the above and foregoing motion.

This the 19th day of August, 1959.

John E. Stone

JOHN E. STONE
P. O. Box 960
Jackson, Mississippi

ILE COPY

Supreme Court, U.S.
FILED
SEP 9 1959
JAMES R. BROWNING, Clerk

No. 265

In the Supreme Court of the United States

October Term, 1959.

SEISMOGRAPH SERVICE CORPORATION, *Appellant*,

vs.

NOEL MONAGHAN, CHAIRMAN, STATE TAX COMMISSION, *Appellee*.

Appeal from the Supreme Court of Mississippi.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS.

DONALD C. BEELAR,
World Center Building,
16th and K Sts. N. W.,
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JOSEPH L. HULL, JR.
P. O. Box 1590,
Tulsa, Oklahoma,

Attorneys for Appellant.

I the Supreme Court of the United States.

October Term, 1969.

No. 285

SEISMOGRAPH SERVICE CORPORATION,
Appellant,
vs.
NOEL MONAGHAN, CHAIRMAN, STATE TAX COMMISSION, *Appellee.*

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS.

The appellant, Seismograph Service Corporation, has appealed from a decision of the Supreme Court of the State of Mississippi denying it a refund of state gross receipts taxes on the conclusion that the same did not violate the Commerce Clause or the Fourteenth Amendment to the federal Constitution as alleged. Appellant's Jurisdictional Statement represents that the Supreme Court of the United States has jurisdiction of such an appeal under Title 28, USC, Section 1257(2), on the grounds that the decision of the highest court of the State of Mississippi upheld a statute the validity of which was drawn in question as being repugnant to the federal Constitution.

The appellee, Noel Monaghan, Chairman, State Tax Commission, has now filed its Motion to Dismiss contending that this cause does not present a substantial federal question and that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument. This brief statement is respectfully submitted to point out to the Court the absence of any showing by appellee in support of its Motion to Dismiss of the grounds on which such dismissal may be sustained.

The arguments presented by appellee in support of its Motion to Dismiss are not directed to the matter of how substantial are the questions which have been raised on this appeal. Instead, the appellee argues a proposition of law which was never an issue below and is not an issue here. Appellant has never denied that "a state has the right to tax local activity carried on within its borders." (Motion to Dismiss, page 4) Appellant has simply contended *ab initio* that its operations for each client were integral and unitary activities in interstate commerce for which it charged and received one unallocable fee, all of which was unconstitutionally subjected to the Mississippi tax without apportionment.

It is apparent that the contentions made by appellees in support of its proposition of law are contentions as to the very facts which this Court has jurisdiction to examine and review in considering "the real nature of the tax and its effect upon the federal right asserted." *Carpenter v. Shaw*, 280 U. S. 363, 367, 50 S. Ct. 121, 123, 74 L. ed. 478. See also *Fiske v. Kansas*, 274 U. S. 380, 47 S. Ct. 655, 71 L. ed. 1108. Obviously, if the evidence shows that "appellant's

operations are purely local" there would be no interstate commerce involved and no valid objection to the tax on the constitutional grounds. But the appellee does not contend, and the Supreme Court of Mississippi did not conclude, that appellant's operations are purely local. Both recognized that appellant's operations consisted of the gathering of information in Mississippi and the interpretation, mapping and reporting thereof in Oklahoma. The Supreme Court of Mississippi said, (Jurisdictional Statement, page 26):

> "In fact, the work done in this State was essential to the interpretative work done in the appellee's home office in Tulsa, Oklahoma" * * *."

The appellee, at page 7, Motion to Dismiss said:

> "True enough only one fee was charged but that fee was based entirely upon appellant's local operations and *not for the whole service or completed job.*" (Emphasis added)

Thus the point argued by appellee is not that appellant's operations are purely local but that the charges which appellant made for its services were based upon its operations in Mississippi. It is respectfully submitted that this is a question of fact as to which the great weight of uncontroverted evidence in the record is contrary to the contentions of appellee in this argument.

The question of whether appellant's operations are local or interstate activities or whether appellant's charges were for local or interstate services are questions directly pertaining to the merits of this case and are properly to be determined by this Court with briefs on the merits and oral argument.

With respect to the further propositions urged in support of appellee's Motion to Dismiss, there is no issue requiring further argument in opposition. Appellant recognizes that "neither the execution nor payment of contract in another state constitutes interstate commerce" (Motion to Dismiss, page 7) if such be the only interstate features involved in an otherwise local activity. But the point which is urged under that proposition fails to give recognition to all of the other integral interstate activities shown by the evidence to be involved in the performance of appellant's services (see Jurisdictional Statement, pages 5-7). The argument as to whether the interstate activities involved in a course of business are such as to constitute that business one in interstate commerce is again one which goes to the merits of this appeal and which requires an examination of the evidence to define the nature of such activities and a judicial determination as to whether they constitute interstate commerce in accordance with this Court's pronouncements on the subject.

Similarly, the argument appearing at page 8 of the Motion to Dismiss under the proposition that "The Burden of Proof Is on Appellant" to prove unfair apportionment begs the question on appeal for if the tax burdens interstate commerce it is unconstitutional and no further proof is necessary. In any view it would seem rather obvious that a state tax which falls upon 100% of the gross receipts from interstate commerce "fails to achieve a fair apportionment."

In summary, it is respectfully submitted that the argument of appellee consists entirely of its contentions on

the points at issue in this appeal and has no bearing on the grounds upon which the Motion to Dismiss has been brought other than to say, in effect, that assuming such contentions are correct there are no grounds for appeal. In order to determine the correctness of such contentions, however, it is necessary that the Supreme Court of the United States determine the appeal on its merits resolving the ultimate questions of fact and the proper application of law.

Conclusion.

Appellant respectfully submits that the grounds upon which appellee moves to dismiss this appeal are wholly unsupported by the arguments which accompany its motion. Such arguments provide no showing that this cause does not present a substantial federal question or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The Motion to Dismiss should be denied.

Respectfully submitted,

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